STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2005
v	No. 254586 Gratiot Circuit Court
JAMES ALAN BELLAMY, Defendant-Appellant.	LC No. 03-004618-FC

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his conviction of second-degree criminal sexual conduct, subsequent offense, MCL 750.520c(1)(a) (child under thirteen years of age), MCL 750.520f. He was sentenced as an habitual second offender, MCL 769.10, to a prison term of fifteen years to twenty-two years and six months. We affirm.

I

Defendant first argues that he was denied his constitutional right to due process because the jury heard evidence of his polygraph examination. Defendant twice moved for a mistrial on this basis, first after alleged references to the examination by a witness, and later after alleged references by the prosecutor during closing argument. The trial court denied both motions. We find no abuse of discretion.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). We review a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003); *Ortiz-Keho, supra* at 512-514.

Reference to a polygraph test is normally inadmissible before a jury. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, such a reference does not always constitute error requiring reversal. *Id*. at 98. An inadvertent, unsolicited mention by a witness that a polygraph was administered does not necessarily require a mistrial. *Ortiz-Kehoe, supra* at 514. Nor does a "brief, inadvertent and isolated" reference to a polygraph test always require reversal. *Nash, supra* at 98, quoting *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981).

This Court may consider various factors to determine whether mention of a polygraph test is error requiring reversal, including:

> "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." [*Nash, supra* at 98 (citations omitted.)]

Contrary to defendant's argument, there were no explicit references to defendant having been administered a polygraph test, either during Detective Longuski's testimony or the prosecutor's rebuttal argument cited by defendant. Longuski did refer to a 1:00 p.m. "test." Further, at one point during the prosecutor's direct examination of Longuski, the prosecutor stated, "So there wouldn't be a checkmark there unless there was an acknowledgement by the *person being tested* that they understood those rights." However, in his testimony, Longuski stated at the outset that his purpose in meeting with defendant was to conduct an interview, and he repeatedly referred to the overall context of his contact with defendant as an "interview."

Moreover, a major focus of Longuski's testimony was not the test or context of the "interview," but rather defendant's admissions to Longuski. Defendant admitted during the interview that he improperly touched the victim's breast and her vagina. During the "interview," defendant also signed a statement in which he admitted the touchings, and he indicated on a drawing of a vagina where he touched the victim.

To the extent that defendant asserts the jury was informed that defendant failed the polygraph examination when Longuski later indicated in his testimony that he told defendant he did not believe defendant's account, we disagree. Detective Longuski did not say *why* he told defendant this. Contrary to defendant's assertion, Longuski's remarks did not "reveal[] the results of the test to the jury."

In moving for a mistrial, defense counsel noted that he did not contemporaneously object to the use of the word "test" because it would draw further attention to the word, and he did not request an instruction to the jury because it likewise would exacerbate the alleged error. While the trial court recognized that the word "test" could be interpreted to refer to a polygraph test, the court concluded that the prejudice was not so significant that a mistrial was warranted. The court noted that the overall context of Longuski's testimony was an interview, and that during his testimony Longuski repeatedly referenced the contact as an "interview." Further, in terms of prejudice, the references to a test were far overshadowed by defendant's admissions.

We agree with the trial court's analysis and find no abuse of discretion given the factors cited in *Nash, supra*. The references were minimal, were not explicit, and were far outweighed by defendant's admissions. As defendant concedes, the references were not made to bolster witness credibility. Moreover, there was no objection in the presence of the jury and no cautionary instruction. These factors weigh in favor of denying a mistrial. *Id*. at 98-99.

For many of the same reasons, we find no abuse of discretion with regard to the denial of defendant's second motion for mistrial. Defendant sought a mistrial after the prosecutor referred to Longuski as an "examiner" four separate times in rebuttal argument. Defendant's objection was expressed after the jury was excused for deliberation and no cautionary instruction was issued to the jury. Further, the prosecutor's remarks did not explicitly or directly indicate that defendant had taken a polygraph test. The term "examiner" could refer to someone who is asking questions, particularly to any police detective *examining* someone during a police interview. As discussed above, the factors do not weigh in favor of granting a mistrial, and given defendant's admissions, we cannot conclude that defendant was prejudiced such that he was denied a fair trial.

II

Defendant next argues that he was denied his right to a fair trial because the prosecutor improperly elicited testimony regarding the victim's account of the sexual assault with leading questions. We disagree. Because this issue is unpreserved, our review is only for plain error affecting defendant's substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

Leading questions should not be used on direct examination, except as may be necessary to develop a witness' testimony. MRE 611(c)(1). Further, "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Three times during the questioning at issue the victim failed to respond to open ended questions about how defendant touched her, i.e., non-leading questions that did not call for a yes or no answer. Accordingly, it is not plain that it was improper for the prosecutor to use leading questions to elicit the challenged testimony from the victim, especially given that it may be difficult for a child to provide testimony about being sexually assaulted.

III

Next, defendant argues that he was denied his right to fair trial because the prosecutor improperly denigrated defense counsel in a remark made during closing argument and, alternatively, that trial counsel was ineffective for failing to object to the remark. We disagree.

Appellate review of unpreserved improper prosecutorial remarks is precluded unless a curative instruction would not have eliminated the prejudicial effect or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Further, unpreserved issues are reviewed only for plain error affecting substantial rights. *Young, supra* at 143.

Defendant challenges the prosecutor's characterization of lawyers in remarks he made after his reference to defense counsel's cross-examination of the victim, in closing argument. In part, the prosecutor noted that defense counsel questioned the victim concerning whether she was sleeping at the time of the assault, to which the victim responded that she was not dreaming. The prosecutor stated:

> Well, I'll tell you, you go to college for four years, you go to law school for three years, you become a lawyer, if you can't—if you can't get an 11 year old kid sleeping on the witness stand, then you're probably in the wrong profession.

A prosecutor may not personally attack a defendant's trial counsel because this type of attack can infringe on the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Nor may the prosecutor shift the jury's focus from the evidence to defense counsel's personality. See *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

The prosecutorial remarks at issue did not directly attack defense counsel and were not sufficiently inflammatory to draw the jury's attention away from the evidence. We find no basis for concluding that any impropriety in this remark could not have been cured by an instruction. *Stanaway, supra* at 687, or that any impropriety in this isolated remark affected defendant's substantial rights, *Young, supra* at 141-142.

With regard to defendant's ineffective assistance of counsel argument, defendant bears the burden of overcoming the strong presumption that counsel's assistance falls within the wide range of reasonable professional assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Here, defendant has not overcome the strong presumption that defense counsel's failure to object to the remark was reasonable and based on trial strategy. *Id*. The remark was not a direct personal attack on defense counsel. Trial counsel could have viewed the remarks as insignificant and may have believed that an objection to the innocuous remarks would have a negative effect on the jury. Defendant has not established a claim of ineffective assistance of counsel.

IV

Defendant argues that he was denied his right to a fair trial by the trial court's denial of his motion for an in camera review of the victim's psychiatric records. We disagree. We review this issue for an abuse of discretion. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996).

MCR 6.201(C)(2) provides:

> If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

Our Supreme Court has similarly stated with respect to in camera review of psychiatric records:

> We hold that where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. [*Stanaway, supra* at 649-650.]

We find no error requiring reversal. The error, if any, did not prejudice defendant's right to a fair trial. As noted previously, evidence clearly established that defendant admitted touching the victim's breast and vagina. We therefore conclude that the error does not require reversal of defendant's convictions. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999); *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

V

Finally, defendant argues that the trial court erred by departing upward from the sentencing guidelines in this case and in its scoring of offense variable (OV) 11. We disagree.

A key reason for the trial court's upward departure from the sentencing guidelines was that defendant was twice convicted of sexually assaulting a child who, in essence, was in a familial relationship to him (in this case, the child was the niece of defendant's girlfriend, and in a prior case, the child was defendant's stepdaughter). The court stated that the guidelines did not adequately measure the severe psychological trauma suffered by the victim, the emotional trauma suffered by the victim's family, and the fact that defendant is a pedophile and rehabilitation is unlikely. With regard to the latter factor, the court noted that despite the fact that defendant served a prison term for his prior conviction, and he admits knowing that what he did in this case was wrong and that he felt ashamed at the time he did it, he was unable to restrain himself. Consequently, defendant should be incarcerated for as long as possible to protect society.

These factors were objective and verifiable. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). While defendant emphasized that his previous CSC conviction was already taken into account, the guidelines variables did not consider defendant's pattern of sexually assaulting children who were effectively, although not technically, in a familial relationship to him. As the court noted, a person who has twice sexually assaulted young children in such circumstances raises concerns of pedophilia and poses a particular danger to children. This was a substantial and compelling reason to depart from the sentencing guidelines, i.e., a factor that should keenly or irresistibly grab one's attention and is of considerable worth in deciding the length of defendant's sentence. *Id*. at 257. Accordingly, the trial court did not abuse its discretion in its upward departure from the sentencing guidelines. Further, we reject defendant's argument that the sentence was disproportionate to the seriousness of his conduct and his criminal history. *Id*. at 264.

Defendant also challenges the scoring of OV 11 because it was based on the trial court's finding that defendant sexually penetrated the victim, i.e., engaged in cunnilingus with her, despite the fact that the jury acquitted him of first-degree CSC. Contrary to defendant's argument, the scoring of the sentencing guidelines does not need to be consistent with the jury verdict. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446, aff'd in part and vacated in part on other grounds 469 Mich 415; 670 NW2d 655 (2003).

Defendant further argues that the trial court erred with regard to the scoring of OV 11 by making findings of fact that were required to be made by a jury, *Blakely v Washington*, 542 US ___; 124 S Ct 2531, 2536; 159 L Ed 2d 403 (2004). However, the Court in *Blakely* specifically limited its holding to determinate sentencing schemes. *Id.* at 542 US ___; 124 S Ct 2540.

Further, our Supreme Court has held that *Blakely* is inapplicable to the Michigan sentencing guidelines. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff